93-677

Supreme Court, U.S.
FILED
OCT 29 1993
OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WALTER ELIAS ISQUIERDO,
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID R. BIRES
Counsel of Record
600 Travis, #3000
Houston, TX 77002
(713)228-8500

STEVEN J. LIEBERMAN
600 Travis, #3000
Houston, TX 77002
(713)228-8500

25 P

QUESTION PRESENTED

I. Whether the Fifth Circuit's departure from the precedent established in United States v. Vasquez, intra., in applying § 2D1.1(b)(1) of the United States Sentencing Guidelines denied the Petitioner due process of law.

LIST OF PARTIES IN APPELLATE COURT

Walter Elias Isquierdo,

Appellant,

United States of America,

Appellee

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
LIST OF PARTIES IN APPELLATE COURT.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
TABLE OF CONTENTS OF APPENDIX TO THE PETITION.....	v
REFERENCE TO OPINIONS OF LQWER COURTS.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISION AT ISSUE.....	2
STATEMENT OF THE CASE.....	3
ARGUMENT.....	11
I. THE COURT'S FINDING, FOR PURPOSES OF SENTENCING, THAT THE PETITIONER POSSESSED A DANGEROUS WEAPON DURING THE COMMISSION OF THE OFFENSE IS CONTRARY TO EASTABLISHED PRECEDENT.....	11
CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases	Page
United States v. Bost, 968 F.2d 729 (8th Cir. 1992).....	16,17
United States v. Edwards, 940 F.2d 1061 (7th Cir. 1991).....	14
United States v. Hooten 924 F.2d 878, 882 (5th Cir. 1991).....	12
United States v. Vasquez, 874 F.2d 250 (5th Cir. 1989).....	11,12, 14,15
Title 18 U.S.C. § 3742.....	1
Title 28 U.S.C. § 1254(1).....	1
Title 28 U.S.C. § 1291.....	1
U.S. Supreme Court Rule 10.....	1
§ 2D1.1 U.S.S.G.....	13
§ 2D1.1(b)(1) U.S.S.G.....	11,12, 14,15, 16,17
Application Note 3, § 2D1.1(b)(1) U.S.S.G.....	11

TABLE OF CONTENTS OF THE
APPENDIX TO THE PETITION

	Page
Cover.....	A-1
Table of Contents.....	A-2
Opinion of The Fifth Circuit Court of Appeals.....	A-3

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WALTER ELIAS ISQUIERDO,
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID R. BIRES
Counsel of Record
600 Travis, #3000
Houston, TX 77002
(713)228-8500

STEVEN J. LIEBERMAN
600 Travis, #3000
Houston, TX 77002
(713)228-8500

CONSTITUTIONAL PROVISION AT ISSUE

1. The Due Process Clause of the Fifth Amendment to the United States Constitution states:

> "[N]or shall any person be deprived of . . . liberty . . . without due process of law."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to the indictment filed in the United States district court for the Southern District of Texas, Houston, Division. References herein shall be made to the trial record, by the designation R.

On September 4, 1991, the Petitioner was indicted by a federal grand jury, charging him with conspiracy to possess with the intent to distribute in excess of five (5) kilograms of cocaine and aiding and abetting the possession with the intent to distribute in excess of five (5) kilograms of cocaine.

In 1990, Robert Gwaltney, a special agent for the FBI, became aware of a group of people who were smuggling cocaine from Columbia through Guatemala and into

Houston. (4 R. 76) He had received this information through a cooperating individual named Claudio Avilas. (4 R. 76)

Gwaltney instructed Avilas on how to deal with a person later identified as Luis Alfredo Garcia-Moreno. (4 R. 104) Around August 8, 1991, Gwaltney received information from Avilas concerning the arrival of a load of cocaine in Houston. (4 R. 11). Avilas was instructed to rent a warehouse and buy whatever equipment was needed to facilitate Garcia and his operation with the latest arrival of cocaine. (4 R. 11). Avilas rented a warehouse in Brookshire, Texas.

Avilas met with Garcia on August 8th at a truck stop on I-45 North to pick up the truck in order to bring it to the warehouse in Brookshire, Texas. (6 R. 381). Avilas drove the truck to the

warehouse where the tires were taken off in order to remove the cocaine. (6 R. 383)

Once at the warehouse the compressor that was used to extract the cocaine burned out. (6 R. 384). Garcia made a phone call in search of money to get another compressor. Id. Following the phone call at 9:00 a.m., Garcia left the warehouse in order to pick up the money. (6 R. 385). Garcia later returned with $2,000.00 which he gave to Ray so that he could get another compressor. (6 R. 387). At that point everyone left the warehouse with the agreement to meet back there at 8:00 a.m. the next morning, August 9, 1991 (6 R. 388). Before returning the next morning, Avilas met with Gwaltney who decided to effect the arrest of those involved. Id.

On the morning of August 8, 1991, surveillance was set up at both a truck stop at I-45 North and Richey Road, and at a warehouse located at 511 Velassco in Brookshire, Texas. (4 R. 112). Avilas would be driving a truck from the truck stop to the warehouse in Brookshire, Texas. (4 R. 112). Surveillance was looking for, and did see, a semi-tractor-trailer that was brought to the warehouse according to the instructions of an individual known as the Professor. (4 R. 159). In addition to the tractor-trailer, a gray Nissan driven by Luis Garcia ("Professor") was seen arriving at the warehouse. Id.

On August 8, 1991, at approximately 9:00 a.m., the Nissan left the shop in Brookshire, Texas, and was followed by FBI special agent, Tom Douglas. (4 R. 160).

The vehicle proceeded to the Stone Forest Apartments at 9801 Fondren. Id. Garcia walked back toward Building 32, which housed apartments 3201 through 3224. (4 R. 161). Garcia walked out from the are approximately thirty minutes later, got in his car and left. (4 R. 162). Douglas followed Garcia back out to the location in Brookshire, Texas. Id.

Michael Sutton, a special agent with the FBI, spoke with the Appellant at the time of his arrest on September 20, 1991. (5 R. 189). The Appellant stated that he knew Luis Alfredo Garcia Moreno by the name of "Larry", and that he had met him around May of 1991. (5 R. 190). Other than the time he met Larry, he had seen him only one other time and that was when Larry came over to his house to borrow $500.00 to pay some bills. (5 R. 190-191).

The Appellant told Sutton that he thought he loaned the money in July. Id. During the course of the conversation, the Appellant stated that he resided at 9801 Larkwood, Apartment 3223, Houston, Texas. (5 R. 192). That address was the Stone Forest Apartment complex. Id.

During the course of surveillance of this operation, a wiretap was placed on Luis Garcia's phone lines. (5 R. 214). Donald Cavender, a special agent with the FBI, testified that he monitored the conversations intercepted through the wiretap of Luis Garcia. (5 R. 209-211). The Government introduced Exhibits "1", "2", and "3", which were cassette tapes of conversations obtained through the wire intercept of Garcia's telephone. (5 R. 214).

The conversations contained on Exhibits "1", "2", and "3" were between Garcia and the Applicant. (5 R. 216, 222, 223). The recorded phone conversations occurred on June 24, 1991, June 27, 1991, and July 19, 1991. (5 R. 223, 224). Cavender testified that through his experience and his conversations with the informant Avilas, he was able to form an opinion as to what was "code" in the conversation. (5 R. 234). Cavender testified that the word "avenue" referred to the price of cocaine, and in response to Garcia's inquiry the Appellant responded that the cocaine was cheap right now. (5 R. 234). Furthermore, according to Cavender's interpretation, the Appellant indicated that the price per kilo would be $3,500.00. (5 R. 235).

Cavender's interpretation of another conversation revealed a discussion between Garcia and the Appellant, where the Appellant allegedly states that the narcotic trafficking business is slow. (5 R. 237). The conversation further revealed that there was a surplus of cocaine in the Houston area. (5 R. 238). The conversations between the Applicant and Garcia originated to and from 9801 Larkwood, Apartment 3223, Houston, Texas.

ARGUMENT

I.

THE COURT'S FINDING, FOR PURPOSES OF SENTENCING, THAT THE PETITIONER POSSESSED A DANGEROUS WEAPON DURING THE COMMISSION OF THE OFFENSE IS CONTRARY TO ESTABLISHED PRECEDENT

The Federal Sentencing Guidelines provide for a two level increase if a dangerous weapon (including a firearm) was possessed during the commission of a drug related offense. § 2D1.1(b)(1) U.S.S.G.; see also United States v. Vasquez, 874 F.2d 250 (5th Cir. 1989). The adjustment should be applied if the weapon was present unless it is "clearly improbable that the weapon was connected with the offense." Application Note 3 § 2D1.1(b)(1). In the instant case, the district court adopted the finding in the pre-sentence report that the Applicant possessed a firearm during the commission

of the offense, and ordered a two level increase. (2 R. 15). The Fifth Circuit Court of Appeals upheld the District Court's finding.

The application of § 2D1.1(b)(1) to this case is contrary to previous decisions of the Fifth Circuit Court of Appeals. The Fifth Circuit has held that a temporal and spatial relationship must exist between the weapon, the drug trafficking activity, and the defendant before a two level increase under § 2D1.1(b)(1) is appropriate. United States v. Hooten, 942 F.2d 878, 882 (5th Cir. 1991). In United States v. Vasquez, supra, the court held where the gun and drugs were no less than miles apart or that the weapon was not "present" and that it was not probable that the weapon was connected with the offense of possession

of cocaine, the two level increase under § 2D1.1 is not appropriate.

The evidence in this case fails to show a temporal or spatial connection between the weapon, the drug trafficking activity and the defendant. The criminal activity for which the Petitioner was charged concluded on August 9, 1991. The weapon was discovered over 40 days later at the Petitioner's residence at 12703 Golden Tree. The intercepted phone calls between Garcia and the Petitioner were traced to and from 9801 Larkwood. The only contact Petitioner had with Garcia occurred at 9801 Larkwood. There is no evidence to show a weapon was present or connected to the offense of aiding and abetting in the possession of cocaine. As a result of the failure to show the weapon was present during the offense or was

connected to the offense, application of a two level increase under § 2D1.1(b)(1) is clearly in conflict with prior decisions of the Fifth Circuit.

The only plausible justification of the application of § 2D1.1(b)(1) to the instant case would be in relation to the Applicant's conviction on the conspiracy count. In order for that to be the case it must be shown that the firearm was possessed or used in furtherance of the conspiracy. See United States v. Edwards, 940 F.2d 1061 (7th Cir. 1991).

Again the failure of the Government to produce evidence connecting the weapon to activities committed in furtherance of the conspiracy make the application of § 2D1.1(b)(1) to this case conflict with previous decisions of the Fifth Circuit Court of Appeals. In United States v.

Vasquez, supra, the court found that the weapons enhancement provision (§ 2D1.1(b)(1)) was not applicable to the defendant's conviction for possession of cocaine. The Court in Vasquez, disclosed that their decision may have been different had the defendant been convicted on the related conspiracy count because there was evidence that phone calls had been made from the location and drug paraphernalia and cash had been stored there in furtherance of the conspiracy. In the instant case, no phone calls were traced to the 12703 Golden Tree address and no drugs, drug paraphernalia, or cash were found at this residence.

The decision of the Fifth Circuit Court of Appeals to apply § 2D1.1(b)(1) to this case is also in conflict with the decisions of other Circuit Courts of

Appeal. In United States v. Bost, 968 F.2d 729 (8th Cir. 1992), Mr. Bost was convicted of conspiracy to distribute heroin. Two and 1/2 months after the last overt act of the charged conspiracy the police arrested and searched his business and residence. Weapons were found at both locations. The Court of Appeals found the lack of a temporal and spatial connection between the weapons at both locations with the offense prohibited them from applying a two level increase under § 2D1.1(b)(1). There was no evidence that a firearm was possessed by the Mr. Bost or was present at the time of the drug transactions. There was no discussion of the use of weapons during the transactions. "But most important, there was no contemporaneity between Bost's charged offense and the discovery of the

weapon..." Id. at 733. As in United States v. Bost, there is no contemporaneity between the charged conspiracy and discovery of the weapon.

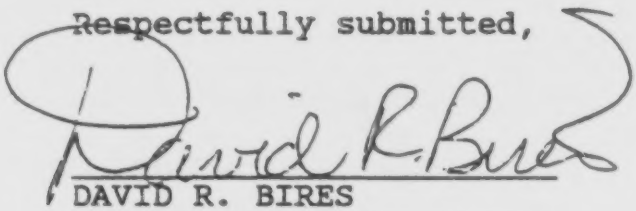
The panel erroneously affirmed the application of a two level increase under § 2D1.1(b)(1) to the Petitioner's sentence, where the Government failed to show a temporal and spatial connection between the drug trafficking activity, the weapon, and the defendant. As has been shown, the Fifth Circuit Court of Appeals has rendered a decision in conflict with it's prior decisions and with those federal circuit courts of appeal cited above.

CONCLUSION

For the foregoing reason, the Petitioner respectfully submits that a compelling basis exists for this Honorable

Court to grant this Petition for Writ of Certiorari, and accordingly reverse the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,



DAVID R. BIRES
600 Travis, Suite 3000
Houston, Texas 77002
(713)228-8500

ATTORNEY FOR PETITIONER

93-677

NO. _____

Supreme Court, U.S.
FILED
OCT 29 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WALTER ELIAS ISQUIERDO
Petitioner

VS.

THE UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

DAVID R. BIRES
Counsel of Record
600 Travis
Suite 3000
Houston, TX 77002
(713)228-8500

STEVEN J. LIEBERMAN
600 Travis
Suite 3000
Houston, TX 77002
(713)228-8500

APPENDIX TABLE OF CONTENTS

	Page
Cover.....	A-1
Table of Contents.....	A-2
Opinion of The Fifth Circuit Court of Appeals.....	A-3

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2273

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALTER ELIAS ISQUIERDO

Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Texas

(CR-H-91-0151-07)

(July 28, 1993)

Before KING and JOLLY, Circuit Judges, and PARKER[1], District Judge.

---

[1] Chief district Judge of the Eastern District of Texas, sitting by designation.

PER CURIAM: [2]

Walter Isquierdo was convicted by a jury in federal district court of conspiracy to possess in excess of five kilograms of cocaine with intent to distribute. The jury also convicted him of aiding and abetting his co-defendants in the possession of more than five kilograms of cocaine with intent to distribute. The district court sentenced him to sixteen years of confinement and to a five-year term of supervised release. Isquierdo appeals from his conviction and sentence. We affirm.

---

[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I. Discussion

A. The Sufficiency of the Evidence

Isquierdo argues that the evidence produced by the government at trial was insufficient to support his convictions for conspiracy to possess and for aiding and abetting his co-defendants in the possession of cocaine. Because Isquierdo did not renew his motion for judgment of acquittal at the close of all the evidence, our review of his case is limited to the determination of whether the record is "devoid of evidence pointing to guilt." United States v. Daniels, 957 F.2d 162, 164 (5th Cir. 1992) (quoting United States v. Robles-Pantoja, 887 F.2d 1250, 1254 (5th Cir. 1989)) (emphasis added). Careful consideration of the record reveals ample evidence to support isquierdo's conviction on both of the

charges. We accordingly find his claims of insufficient evidence to be without merit.

B. The Evidentiary Rulings

Isquierdo also argues that the district court erred when it refused to submit to the jury a copy of a co-defendant's plea agreement with the government. the district court ruled that the agreement was irrelevant and would be prejudicial both to Isquierdo and to the government. We review evidentiary rulings for abuse of discretion. United States v. Liu, 906 F.2d 449, 452 (5th Cir. 1992), cert. denied, 113 S.Ct. 418 (1992). The district court has "wide discretion in determining relevance." United States v. Rodrigo, 934 F.2d 595, 597 (5th Cir. 1991) (quoting United States v. Silva, 748 F.2d 262 (5th Cir. 1984)), cert. denied, 112

S.Ct. 641 (1991). Similarly, "[the] balancing of probative value against prejudice is committed to the sound discretion of the trial judge . . . ." United States v. Maceo, 947 F.2d 1191, 1199 (5th Cir. 1991) (quoting United States v. Thompson, 837 F.2d 673, 677 (5th Cir. 1988), cert. denied, 488 U.S. 832 (1988)), cert. denied, 112 S.Ct. 1510 (1992). After a thorough reading of the record, we conclude that the district court did not abuse its discretion when it excluded the plea agreement from the evidence submitted to the jury.

It is further argued that the district court abused its discretion when it admitted evidence of an extraneous offense committed by Isquierdo. This court has established a two-step test for determining whether to admit extrinsic-

offense evidence:

> First, it must be determined that the extrinsic evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice . . . .

United States v. Beechum, 582 F.2d 898, 910 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979) (footnote omitted). If a party requests that the probative value of the evidence be weighed against its prejudicial effect, the court must make an on-the-record finding to that effect unless the relevant factors for the evaluation are "readily apparent from the record." Maceo, 947 f.2d at 1191 nn.3-4. In the case at hand, Isquierdo failed to request a Beechum finding. Moreover, even is such a finding had been requested, the record in this case makes apparent the factors of the district court's

evaluation. We accordingly reject Isquierdo's argument.

C. The Jury Instruction

Isquierdo also argues that the district court erred in refusing to submit to the jury an instruction on multiple conspiracies. A defendant is entitled to have the jury instructed on a defense theory if there exists in the record sufficient evidence to allow a reasonable juror to rule in favor of the defendant on that theory. United States v. Stowell, 953 F.2d 188, 189 (5th Cir. 1992), cert. denied, 112 S.Ct. 1269 (1992). In the case at hand the evidence in the record only showed participation in the charged conspiracy and provided no grounds to establish the existence of a separate conspiracy between Isquierdo and Garcia. We therefore support the district court's

refusal to submit an instruction on multiple conspiracies to the jury.

D. The Sentencing Enhancement

Finally, Isquierdo argues that there was insufficient evidence for the district court to find that he possessed a firearm during the commission of the offenses for which he was convicted, and therefore to increase his base offense level for sentencing purposes. We review the district court's factual finding that Isquierdo possessed a firearm during the commission of his offense only for clear error. United States v. Menesses, 962 F.2d 420, 428 (5th Cir. 1992). Moreover, "[o]nce it is established that a firearm was present during the offense, the district court should apply the [sentencing] enhancement unless it is clearly improbable that the weapon was

connected with the offense." United States v. Webster, 960 F.2d 1301, 1310 (5th Cir. 1992) (citing U.S.S.G. § 2D1.1, comment. (n.3)), cert. denied, 113 S.Ct. 355 (1992). After reviewing the record in light of the above standard, we uphold the sentencing enhancement applied by the district court.

II. Conclusion

for the foregoing reasons, we AFFIRM the conviction and sentencing of Isquierdo on all grounds.